IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2)(b)

Description of Case

Criminal Appeal No.155 of 2007

{Old No. 1335 of 1984}

Date of decision:- 24.09.2007

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date :-24.09.2007 Initials of Judge

Note:- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARAKHAND, AT NAINITAL
Criminal Appeal No. 155 of 2007
{Old No. 1335 of 1984}

1. Ram Singh S/o Dewan Singh
   R/o Mauza Seema Patwari Chetra
   Post Manila, District Almora
2. Himmat Singh
   S/o Saropa Singh
   R/o Mauza Bunga Patwari Chetra
   Post Manila, District Almora .....Appellants

Versus

State .....Respondent

Delivery of Judgment : 24th September, 2007

Mr. R. S. Sammal Advocate with Mr. Prem Kaushal Advocate for the appellants.
Mr. G. S. Sandhu, Government Advocate with Mr. B.S. Parihar Brief Holder for respondent.

Coram: Hon'ble Rajeev Gupta, C.J.
Hon'ble J. C. S. Rawat, J.

Per:- Hon'ble J.C.S. Rawat, J.

This criminal appeal has been filed against the judgment & order dated 14.03.1984 passed by Sri Bramha Kishore, the then Sessions Judge, Almora (Camp Ranikhet) in S.T. No.50 of 1983 whereby the appellants Ram Singh and Himmat Singh were convicted and sentenced to undergo imprisonment for life under section 302/34 IPC. Both the appellants were also convicted and sentenced to undergo imprisonment for life under section 460 IPC. Both the sentence were to run concurrently.

2. The facts, in nutshell, are that a written report Ex.ka.1 was lodged by Nandan Singh Manral PW1 at the headquarter of Patwari Kuridhar at 2a.m. in the intervening night of 09/10.08.1983 alleging therein that on 09.08.1983 at about 9:30p.m. with a view to

commit theft two unknown persons unauthorizedly entered into the house of Smt. Motuli Devi – widow of Trilok Singh. After entering into the house, the accused persons strangulated Smt. Motuli Devi and stabbed her with a '*Chura*'. Hearing the noise, the people of neighbouring houses gathered there and found Smt. Motuli Devi still alive in the injured condition and they enquired from her about the incident. Smt. Motuli Devi told them that two unknown persons with a view to commit theft strangulated her neck and given knife blow to her. In the meantime, the accused persons made their escape good leaving a '*Chura*', a pair of shoes & '*Chappal*', battery torch and a '*Kanghi*'(comb) at the spot. On the basis of report, a Chick FIR was prepared and necessary entries were made in the general diary. The Patwari visited the spot and recorded the statement of Nandan Singh Manral PW1 and sent a person to call Patwari Manila for his help. After appointing panches, the Patwari prepared the inquest report and other connected papers. The Patwari found a piece of rope Ex.7 around the neck of the dead body and got it removed. He also got removed the blood stained blouse and petticoat worn by the deceased and took it in his possession. The Patwari took the bood stained '*Chura*', a *Lorha/Batta* (a piece of stone used for grinding spices), a battery torch and '*Kanghi*' (comb) lying near the dead body. He also recovered a pair of leather shoes and '*Hawai Chappal*' lying outside the house of the deceased. When the appellant Himmat Singh was arrested by the Patwari, he interrogated the appellant Himmat Singh and saw a blood stained injury above the knee of his right leg. After completing the investigation, the Investigating

officer submitted the chargesheet before the court against the appellants.

3. After submission of chargesheet the appellants-accused were committed to the court of Sessions for trial and the trial court framed charges against the accused persons. They denied the charges levelled against them and claimed their trial.

4. The prosecution in support of its case examined eight witnesses. Nandan Singh Manral PW1 is the scribe of the FIR and he is the informant of this case. He is the witness before whom the deceased told him that she had been strangulated and thereafter stabbed by the appellants. The prosecution has also adduced the evidence of Madan Singh Adhikari PW2, who is the Patwari of Ratan Khal. Appellant Himmat Singh was apprehended by Joga Singh PW6 on 10.08.1983 and he was handed over to Patwari, Ratan Khal. Dr. V. S. Pal PW3 is the medical officer, who conducted the postmortem on the dead body of the deceased. The prosecution has also adduced the evidence of Umed Singh PW4 who has stated in his evidence that the appellant Himmat Singh took tea in his tea-stall at about 6am on 10.08.1983 and purchased a pair of '*Hawai Chappal*' from his shop and thereafter he left the shop. He is also the witness of extra-judicial confession made by Himmat Singh appellant. The prosecution has also adduced the evidence of Inder Singh Bangari PW5 and Joga Singh PW6 before whom the dying declaration was made by the deceased. Indra Singh Bangari PW5 and Joga Singh PW6 proved the oral dying declaration of the deceased. Joga Singh PW6 is also the witness of

extra-judicial confession made by Himmat Singh. Moti Singh PW7 has proved the 'Panchayatnama' Ex.ka.4. T.D. Sati PW8 is the Investigating Officer of this case and he proved the chargesheet.

5. The accused persons were examined u/s 313 Cr.P.C. and they have pleaded not guilty to the offence. They have stated that they have been falsely implicated in this case. Accused Himmat Singh has further stated in his statement recorded under section 313 Cr.P.C. that his elder sister Bhaguli Devi had abducted one-Smt. Lachima Devi (wife of Umed Singh PW4) and took her to Delhi, due to this reason Umed Singh PW4 was nourishing enmity against him. Himmat Singh has further stated that one-Kunwar Singh was selling the land situated below the house of Joga Singh PW6. He further stated that his father has purchased the said land from Kunwar Singh, although Joga Singh PW6 was also interested in the said land. Himmat Singh has further stated that these witnesses i.e. Umed Singh PW4 and Joga Singh PW6 were deposing falsely against him on account of enmity. He further stated that Km. Ganeshi – the daughter of Diwan Singh was grazing her goats. Her goats came in the field of Nandan Singh, who hurled stones at them. During the course of hurling stones at the goats, a stone him Km. Ganeshi. Consequently, Joga Singh and Diwan Singh instituted a case against his brother Nandan Singh in the court of Ranikhet. It was further stated that Smt. Mobuli Devi, the real sister of his father was living in *Sihun Nawla* village. When Smt. Motuli Devi became widow, she sold her property and left her house. At that time, Nandan Singh witness told villagers that Smt. Motuli

Devi has given all her belongings to Saroop Singh. Upon the above statement of Nandan Singh, the people of the village searched their house, but nothing belonging to Smt. Motuli Devi was found in their house. Due to this reason, Nandan Singh PW1 and Indra Singh Bangari PW5 got annoyed with him. Accused Ram Singh has stated in his statement recorded under section 313 Cr.P.C. that he has been falsely implicated in this case. He has further stated that he was not present at the spot at the time of incident and he was in Delhi at the relevant time.

6. The appellants in the trial eventually were convicted and sentenced by the trial court as mentioned above.

7. We have heard learned counsel for the appellants and learned Government Advocate for the respondent-State. Perused the record carefully.

8. At the outset, it needs to be mentioned here that it is not disputed that Smt. Motuli Devi deceased died on account of ante-mortem injuries sustained by her on the date of occurrence. Dr. V. S. Pal (PW3), Medical Officer conducted the postmortem of deceased on 12.08.1983 at 3p.m. and found following ante-mortem injuries on the person of the deceased:-

(i) Incised wound (punctured 3cm x 1cm x peritoneal cavity deep. 28cm from tip of left shoulder at 5 o'clock.

(ii) Contusion on left breast 3cm x 3 cm medial to nipple.

In the opinion of Medical Officer, the death of the deceased was caused due to shock and haemorrhage resulting from the ante-mortem injuries. The medical officer has proved the postmortem report Ex.ka.2. He has opined that the incised or punctured wound could be inflicted by a knife and the contusion could be caused by '*Batta*' (stone). He further opined that the death of the deceased could occur at about 9p.m. on 09.08.1983 and the ante-mortem injuries received by her were sufficient to cause death in the ordinary course of nature. Thus, it is amply established that deceased met a homicidal death on account of ante-mortem injuries sustained by her.

9. Now, we have to consider as to whether the appellants were responsible for causing the death of the deceased. There was no eyewitness of the incident and the prosecution case rests upon circumstantial evidence. The law which is fairly settled about circumstantial evidence is that it should be such as to point out only to the guilt of the accused. The evidence should exclude all other hypothesis except the guilt of the accused. It is often said that though witnesses may lie, circumstances will not but at the same time it must cautiously be scrutinized to see that the incriminating circumstances are such as to lead only to a hypothesis of guilt and reasonably exclude every possibility of innocence of the accused. In order to sustain conviction on circumstantial evidence, each of the incriminating piece of circumstantial evidence should be proved by cogent and reliable evidence and

the court should be satisfied that the piece of evidence taken together forge such a chain wherefrom no inference other than the guilt can be drawn.

10. The Hon'ble Apex Court in **Sharad Birdhichand Sarda Vs. State of Maharashtra (AIR 1984 SC 1622)** while dealing with circumstantial evidence, has held that onus is always on the prosecution to prove that the chain is complete. The condition precedent before conviction could be based on circumstantial evidence were enumerated as under :-

(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

(ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(iii) the circumstances should be of a conclusive nature and tendency;

(iv) They should exclude every possible hypothesis except the one to be proved; and

(v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

The above decision was also followed in the decisions of the Hon'ble Apex Court in **State of Rajasthan Vs. Rajaram 2003 Cri.L.J. p/3901, State of U.P. Vs. Satish 2005 SCC (Cri) 642 and Ram Singh Vs. Sonia & others 2007 (3) SCC 1.**

11. The prosecution case rests mainly on the oral dying declaration which is said to have been made by deceased Motuli Devi before N. S. Manral PW1, Indra Singh Bangari PW5 and Joga Singh PW6; and the extra-judicial confession said to have been made by the accused Himmat Singh before Umed Singh PW4 and Joga Singh PW6.

12. The prosecution in regard to the dying declaration has adduced the evidence of N. S. Manral PW1, Indra Singh Bangari PW5 and Joga Singh PW6 who reached firstly in the house of Smt. Motuli Devi deceased and saw her in an injured condition. Smt. Motuli Devi-deceased made an oral dying declaration before these witnesses about the manner how she received injuries on her person. She also stated to them about the participation of the appellants-accused in the said commission of offence. N. S. Manral PW1 – informant, Indra Singh Bangari PW5 and Joga Singh PW6 have categorically stated in their evidence that when they heard some noise from the house of the deceased they came to her house and found that Smt. Motuli Devi (deceased) had sustained injuries on her person. Smt. Motuli Devi stated to them that Himmat Singh and Ram Singh had caused injuries on her person with 'knife'

and '*Loda/Batta*' (a piece of stone used for grinding spices). She also stated that the accused persons had taken her entire ornaments and money kept in her house. Thereafter, the appellants-accused fled away from the place of occurrence. The trial court has relied upon the dying declaration made by the deceased before N. S. Manral PW1, Indra Singh Bangari PW5 and Joga Singh PW6.

13. It is settled position of law that if the dying declaration is found as true and reliable it may form the sole basis of conviction even without corroboration of any independent source. In order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny. It is settled principle of law that hearsay evidence is excluded and best evidence must be produced before the court. There is an exception under section 32 of the Indian Evidence Act to the above embodied general rule with regard to the statements and declarations by the persons from deceased. A dying declaration made by a person who is dead as to cause of his/her death or as to any circumstances of the transaction which resulted in his/her death, in cases in which cause of death comes in question, is relevant under section 32 of the Indian Evidence Act and is also admissible in evidence. Though, dying declaration is indirect evidence being a specie of hearsay, yet it is an exception to the rule against admissibility of hearsay evidence. Indeed, it is substantive evidence and like any other substantive evidence requires no corroboration for forming basis of conviction of an accused. At the same time, it is also pertinent to mention that the accused has no power to

cross examine it. Such a power is essential for eliciting the truth as an obligation of oath could be. The dying declaration bears a great weight. The admissibility and relevancy is one aspect of the matter and reliability of the evidence of dying declaration has also to be seen in the light of other attending circumstances. Before acting upon the dying declaration, the court has to satisfy itself that dying declaration is of such a nature as to inspire full confidence in its correctness. The court should be satisfied that the statement of the deceased was not a result of either tutoring, or prompting or product of imagination. The court must be very cautious while accepting the oral dying declaration. It is wholly based on oral evidence of the witnesses. Before relying upon the dying declaration, the trial court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and participation of the assailants of the victim. If, on the other hand, the court after examining the dying declaration in all its aspects and testing its veracity has come to the conclusion that it is not reliable by itself and it suffers from an infirmity then it cannot form the basis of conviction. In the light of the enunciation of law as above, we have to examine as to whether the oral dying declaration made by the deceased was reliable and truthful or not.

14. Learned counsel for the appellants contended that N. S. Manral PW1 – informant has not mentioned the names of any of the accused persons in the FIR. It is also in the evidence that N. S. Manral PW1 – informant reached at the spot immediately after the incident and

the deceased had clearly disclosed the names of miscreants and robbers. It was also further contended on behalf of the appellants that N. S. Manral PW1 scribed the report after hearing the dying declaration made by the deceased and inspite of the knowledge of names of the culprits he did not mention their names in the FIR. He further contended that the entire story of oral dying declaration regarding the participation of appellants cannot be believed. Learned G.A. refuted the contention and supported the findings recorded by the trial court in this regard. It is true that the FIR of the incident was lodged against the unknown persons. N. S. Manral PW1 had not mentioned the names of the appellants-accused in the FIR. According to the evidence of N.S. Mantal P.W.1, Smt. Motuli Devi had disclosed the names of the culprits in her dying declaration before scribing the written report. When N. S. Manral PW1 appeared before the court he has categorically stated in his evidence that when he alongwith Indra Singh Bangari PW5 and Joga Singh PW6 reached in the house of Smt. Motuli Devi, she had stated to them that the appellants-accused had robbed and assaulted her. Thereafter, N. S. Manral PW1 scribed the report and went to the Patwari to lodge it. He had further stated in his evidence that the appellants-accused were named as assailants by the deceased in her dying declaration, but he did not believe about the participation of the appellants because as per his knowledge both appellants were residing in Delhi and for this reason he did not mention their names in the report Ex.ka.1. We notice that this important fact, namely, that the deceased made an oral dying declaration implicating the appellants as the

assailants, was not made in the FIR and this fact was brought before the court with explanation for omission in the FIR; this fact raises doubts as to the veracity of the oral dying declaration. Thus, the evidence of N. S. Manral PW1 suffers from serious infirmity. When the case was being investigated, the prosecution tried to develop a case that Smt. Motuli Devi – deceased had given her dying declaration regarding the participation of the appellants-accused in the robbery and murder. The explanation given by him in the evidence also appears to be unnatural that creates a doubt regarding the correctness of the oral dying declaration made by the deceased to any of the witness. If really, the deceased had given a dying declaration regarding the participation of the appellants as culprits in the commission of the offence, N. S. Manral PW1 would not have failed to mention the names of the accused in the FIR. Non-mentioning the names of the culprits though it was known to N. S. Manral PW1 leads to take an inference that the deceased had not given any dying declaration to any of the witnesses. It is pertinent to mention here that the FIR mentions when the informant reached at the spot and deceased was alive. On being enquired from her, the deceased stated that she has been strangulated and robbed by unknown accused. All this leads us to take an inference that the evidence of N. S. Manral PW1, Indra Singh Bangari PW5 and Joga Singh PW6 before whom the dying declaration was alleged to have been made cannot be relied upon. In the case of **Ramesh Prasad v. State of Bihar 1999 (9) SCC 433,** two oral dying declarations were made by the deceased, on stated to have been made before her sister Sheela and second

before another sister Asha Kumari in presence of Subodh Kumar. The trial court relying upon two oral dying declaration and the conduct of the appellant in not trying to save his wife by getting her admitted in the hospital held that the appellant has caused her death by pouring kerosene oil and setting her on fire. Other co-accused was acquitted for want of evidence. The High Court in appeal also relying upon the two oral dying declarations confirmed the conviction of the appellant. The Hon'ble Apex while allowing the appeal has held as under:-

> *"9. Reverting back to the evidence of Asha Kumari (PW 4) what we find is that her evidence also suffers from serious infirmities. Even though her initial version before the police was that Saroj had accompanied them, before the Court she stated that Saroj was with them in the car only while returning from Ranchi. She has been contradicted on this point. Her conduct, as disclosed by the answers given by her in cross-examination, also appears to be unnatural and that creates a doubt regarding correctness of what she has deposed before the Court. If she had really come to know through Chandrakanta that her husband had poured kerosene over her she would not have failed to inform the police. When Dr Rita Choudhary had come to treat Chandrakanta this witness did not tell her anything about how she had received burns though Dr Rita Choudhary had tried to ascertain that from Chandrakanta. She had not disclosed to anyone how her sister had received burns and her explanation for not doing so is that Davendra had told her not to give correct information to anyone. It is difficult to accept this explanation because she has not given any reason why she had agreed to do so. All these infirmities lead us to believe that she is not a witness on whom implicit reliance can be placed. The courts below were, therefore, not right in relying upon the oral dying declaration stated to have been made to her by Chandrakanta without any independent corroboration.*
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> *10. The High Court also committed an error in holding that the presence of incriminating articles like empty kerosene tin, half-lighted matchstick, half-lighted clothes and broken bangles in the puja room clearly indicated the involvement of the appellant. The prosecution evidence is that they were removed from that room by the family*

members of the appellant. They were, therefore, charged and tried for the offence punishable under Section 201 IPC. If they were removed from that room then how they were found in that room remains unexplained.

11. As the courts below having overlooked all these important aspects the findings arrived at by them have to be regarded as erroneous. In our opinion, the courts below have committed a grave error in relying upon the oral dying declarations and convicting the appellants on the basis thereof for the offence of murder. Circumstantial evidence is also not such on the basis of which the conviction can be sustained. We, therefore, allow this appeal, set aside the conviction of the appellant under Section 302 IPC and the sentence imposed upon him."

15. When the circumstances leading to give dying declaration in the present case are taken in its entirety the alleged dying declaration of the deceased is not believable and it leads to take inference that the deceased did not make any dying declaration mentioning the names of the appellants. The factual scenario as projected by the prosecution goes to show that the alleged dying declaration cannot be relied upon. Moreover, N. S. Manral PW1 and Indra Singh Bangari PW5 had stated in their evidence that deceased told them that the appellants strangulated her neck by a rope and thereafter they caused injuries on her person. It is apparent from the perusal of the evidence of the autopsy surgeon and the postmortem report that there is no sign of strangulation on the neck of the deceased Smt. Motuli Devi and there is no injury which can be caused by a rope on the neck of the deceased. Thus, the dying declaration as projected by the prosecution is not corroborated by the medical evidence also. The trial court, therefore, erred in relying upon the oral dying declaration which was stated to have been made to N.S. Manral PW1, Inder

Singh Bangari PW5 and Joga Singh PW6. We find force in the contention of the learned counsel for the appellants.

16. Now, we will discuss the second circumstance projected by the prosecution i.e. the extra-judicial confession made by the appellant Himmat Singh before Umed Singh PW4 and Joga Singh PW6. Joga Singh PW6 is the Pradhan of Besarbagar adjoining village of Bonga where the incident took place and he has stated in his evidence that he alongwith other villagers was in search of culprits and they went towards the bus stand of village Ratan Khal where they enquired from Umed Singh PW4 who had a shop in village 'Ratan Khal' as to whether any person belonging to the village of deceased Smt. Motuli Devi was seen coming towards the village. Umed Singh PW4 told them that on 10.08.1983 at about 6a.m. appellant Himmat Singh came in his tea-stall without wearing any shoe or '*Chappal*' and took a cup of tea in his tea stall. Himmat Singh purchased a pair of '*Chappal*' from his shop and wore '*Chappal*' immediately after purchasing it and went towards Doliyal Bazar in the morning at about 6am. Thereupon, Joga Singh PW6 and others made a search of Himmat Singh and ultimately he was found and apprehended by them. Himmat Singh told them in presence of Umed Singh PW4 that he alongwith co-accused Ram Singh had committed the murder of the deceased Smt. Motuli Devi and robbed her valuables. Himmat Singh further stated to them that the robbed valuables have been taken by the co-accused Ram Singh. He further stated that Ram Singh (appellant) had given a knife blow on his knee during the melee. Thus, the appellant Himmat Singh has confessed his

guilt before Joga Singh PW6, Umed Singh PW4 and other villagers, and thereafter he was handed over to Madan Singh Adhikari, Patwari (PW2). The trial court had relied upon the extra judicial confession of Himmat Singh and has taken it an incriminating circumstance against the appellant Himmat Singh as well as Ram Singh. It was pointed out by the learned counsel for the appellants that Joga Singh PW6 has stated in his examination-in-chief that after apprehending the appellant Himmat Singh, he was threatened and intimidated and thereafter he made a extra-judicial confession. The learned counsel further contended that the extra judicial confession was obtained under threat and intimidation and it is not admissible under the Evidence Act. The trial court has erred in relying upon the extra-judicial confession to convict the appellants. Learned G.A. supported the finding recorded by the trial court. To make the confession relevant under the provisions of the Indian Evidence Act, it must be shown that it was made by an accused person; it must be voluntary; and in order to make it a foundation for conviction it must be further shown that it is true. Any inducement in the nature of a promise, threat or intimidation to accused from a person affects its voluntary character and vitiates the confession. The extra judicial confessions which are not voluntary are excluded from the evidence. The reason for the rejection or the exclusion is that when the confessions are caused by inducement, threat or promise offered by a person there is the danger of the accused falsely implicating himself. In view of the legal proposition of law, we will, now, scrutinize the facts of the present case. It is apparent from the evidence of Joga Singh

PW6 that intimidation and threat was given to the appellant Himmat Singh and thereafter he made the extra-judicial confession. In order to render a confession admissible, it must be perfectly voluntary and there is no doubt that any inducement in the nature of promise or of a threat given by a person before whom the confession has been made vitiate the confession. If the appellant Himmat Singh had been threatened by Joga Singh PW6 and others and he confessed his guilt before them, the confessional statement made by him in consequence of any such threat and intimidation must be rejected. In view of the above, the extra-judicial confession made by the appellant Himmat Singh is not voluntary and as such it cannot be relied upon. The trial court has erred in relying upon the extra judicial confession which was extracted by giving threat and intimidation.

17. The extra judicial confession contains that Ram Singh and Himmat Singh have committed the murder of Smt. Motuli Devi – deceased and robbed her valuables. It was pointed out by the learned G.A. that there is an admissible evidence of co-accused implicating himself as well as Ram Singh in the commission of the offence. Appellant Himmat Singh had made an extra-judicial confession implicating himself and the appellant Ram Singh for committing the murder of the deceased. We have already noticed that the extra-judicial confession made by co-accused Himmat Singh was no voluntary and is not admissible in evidence. As such, it can not be relied against Ram Singh appellant. Even if, it is assumed that confession can be relied. Now, the question arises as to whether

such confession is admissible and on the basis of such confession co-accused can be convicted. Section 30 of the Indian Evidence Act provides as nder:-

> **Section 30. Consideration of proved confession affecting person making it and others jointly under trial for same offence.-** When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.
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> Explanation.- "Offence", as used in this section, includes the abetment of, or attempt to commit, the offence.

18. In view of above, before a statement by one of the accused persons can be taken into consideration against the other accused, the following conditions must be fulfilled:-

(i) There must be a joint trial for the same offence.

(ii) It must be a confession.

(iii) The confession of guilt must affect himself and the others, i.e. implicate the maker substantially to the same extent as the other co-accused.

(iv) The confession of guilt must be duly proved.

19. It is apparent from perusal of above that both the accused persons must be tried jointly for the same offence. It is also essential from the perusal of the above provisions that it goes without saying that such statement must also implicate the co-accused to the same extent as the maker. It is also well settled

position of law that this section does not provide that such confession is evidence; still less does it say, that it may be the foundation of a case against the person implicated. The extra-judicial confession of an accused person is not evidence against a co-accused in the sense that conviction on that alone could be supported. It could only be taken into consideration.

20. Under section 30 of the Indian Evidence Act, the phrase used in the section is that “it may be taken into consideration”. Perusal of the aforesaid section clearly reveals that it is not an evidence as provided under the Indian Evidence Act. In dealing with the confession of a co-accused, the Court must begin with other evidence produced by the prosecution and after it has formed its opinion as to the quality and effect of that evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt. The confession of the co-accused cannot be treated as substantive evidence. When the substantive evidence is not sufficient to establish a prima-facie case, the confession cannot be used against the co-accused. It can only be used to lend assurance to the conclusion arrived at on the other evidence about the accused’s complicity in the crime. It can in no case be used to fill up gap in the prosecution case. The evidence of section 30 against the co-accused is of too weak a character to form the basis of conviction. The words “may take into consideration” used in the aforesaid section connote the idea that there must be other material beside the confession of a co-accused to form the basis of conviction.

21. In the case of **State of M.P. Vs. Paltan Mallah & others 2005 SCC (Cri) 674,** the Hon'ble Apex Court has held as follows:-

> *"18. Another incriminating circumstance sought to be proved against the accused in the extra-judicial confession alleged to have been made by the ninth accused Paltan Mallah wherein he named A-1, A-2, A-5 and A-6. It is alleged that he made the confession to PW 105 Satyaprakash Nisad and A-9 is alleged to have disclosed to PW 105 that these accused persons had given him money and he murdered Shankar Guha Niyogi for the sake of money. Under Section 30 of the Evidence Act, the extra-judicial confession made by a co-accused could be admitted in evidence only as a corroborative piece of evidence. In the absence of any substantive evidence against these accused persons, the extra-judicial confession allegedly made by the ninth accused loses its significance and there cannot be any conviction based on such extra-judicial confession. The High Court, in our view, has given cogent and satisfying reasons for the acquittal of the accused A-1 to A-8. We do not find any reason to interfere with such a finding, ……"*

22. As we have noticed earlier that the extra-judicial confession made by co-accused Himmat Singh was not voluntary in nature and it can not be relied upon. Such confession which is not voluntary can not be taken into account for the co-accused Ram Singh also. The appellant Ram Singh can not be convicted on the basis of such inadmissible extra-judicial confession.

23. The trial court has also relied upon the circumstance that the I.O. recovered a piece of rope, blood stained knife, *Batta,* battery torch and a comb near the dead body of the deceased. The prosecution also led the evidence that a pair of '*Hawai Chappal*' and leather shoe were also recovered by the I.O. just outside the house of the deceased Smt. Motuli Devi. Perusal of the record reveals that the prosecution has not produced any evidence that these articles belonged to the appellants and the appellants-accused were seen wearing '*Hawai Chappal*' and shoe immediately before the incident. It has also not in the evidence that the appellants were carrying the knife, rope and other articles with them immediately before the incident. Thus, the prosecution has not connected these articles with the appellants-accused by any evidence. It may further be stated that these articles are of common use. It cannot be said that there was something peculiar with these articles that these articles could only be used by the appellants and not by any other person. Thus, the recovery of above articles cannot be said to be an incriminating circumstance against the appellant-accused. The circumstantial evidence consist of evidence of various facts which are so closely associated with the fact in issue which taken together form a chain of circumstance from which the existence of principle fact can legally inferred or presumed. The above circumstance did not take an inference that these articles were carried by the appellants-accused before the incident at the place occurrence. Therefore, the trial court fell in error in holding that recovery of those articles from the spot or from the appellants

Himmat Singh was an incriminating circumstance against the appellants.

24. The trial court has further relied upon the evidence of Umed Singh PW4. He is a shopkeeper in village Ratan Khal which is also known as Mania. He has stated in his evidence that the accused appellant Himmat Singh came to his shop at about 6am on 10.08.1983. Umed Singh PW4 has further stated in his evidence that the appellant Himmat Singh took tea and purchased a pair of '*Hawai Chappal*' from his shop. Himmat Singh also informed him on the enquiry that he came in the village two days before the incident. He also informed that a murder has been committed in his village and he is going to Doliyal Bazar and thereafter he left his shop. The trial court has held that the circumstance of purchasing a pair of '*Hawai Chappal*' connects the appellant Himmat Singh with the crime because he came to his shop without wearing shoe or 'chappal'. Perusal of the record reveals that the incident took place on 09.08.1983 at about 9pm and Umed Singh PW4 has stated in his evidence that the appellant Himmat Singh came to his shop at about 6a.m. on the next day of the incident i.e. on 10.08.1983 and he took tea and also purchased '*Hawai Chappal*' from his shop and thereafter he left the shop. It is not in the evidence that the same '*Hawai Chappal*' which was purchased by him was found outside the house of the deceased on 10.08.1983 and it was also not possible. Merely taking tea and purchasing '*Hawai Chappal*' cannot lead to take an inference that the appellant Himmat Singh was connected with the crime. The circumstance of purchasing '*Hawai Chappal*' has no

connection of appellant Himmat Singh with the crime. Thus, the circumstance projected by the prosecution is not the incriminating circumstance. The trial court erred in holding that it was an incriminating circumstance against the appellant Himmat Singh.

25. It is true that the conviction can be based solely on the circumstantial evidence but it should be tested on the touch stone of law relating to circumstantial evidence. The circumstantial evidence must be as such which the conclusion of the guilt it is be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. When the evidence on record is analyzed in the background of the principles highlighted above, the inevitable conclusion is that the circumstance projected by the prosecution against appellants are not consistent with the hypothesis of the guilt of the accused. After perusal of the entire evidence and the circumstances projected by the prosecution, we are of the view that the prosecution could not establish the case against the appellants.

26. We, therefore, hold that the prosecution has failed in establishing the guilt, beyond reasonable doubt, against the appellants. We find that the learned trial court has erred in convicting and sentencing the appellants. Hence, the appeal is allowed and the conviction and sentence against the appellants awarded by the trial court are set aside. Therefore, the appellants are liable to be acquitted and are hereby acquitted from the charges levelled against them. Bail bonds of appellants are cancelled and sureties discharged.

27. Let the lower court record be sent back to the court concerned.

(J.C.S. Rawat, J.) **(Rajeev Gupta, C.J.)**

Dated 24th September, 2007

LSR